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**BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS**

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**REDACTED DECISION – DK#’S 14-395 PT, 14-396 CU, 14-397 P**

**BY: A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE**

**SUBMITTED FOR DECISION ON JANUARY 31, 2019**

**ISSUED ON JULY 16, 2019**

**NOTE: THIS ADMINISTRATIVE DECISION WAS APPEALED BEYOND THE  
OFFICE OF TAX APPEALS**

### **FINAL DECISION**

On November 18, 2014, the Auditing Division of the West Virginia State Tax Commissioner’s Office (the Tax Department or the Respondent) issued two Audit Notice of Assessments, against the Petitioner, Company A. (hereinafter “the Company”) and one Audit Notice of Assessment against the Petitioner, (hereinafter “the Petitioner”)<sup>1</sup>. These assessments were issued pursuant to the authority of the State Tax Commissioner, granted to him by the provisions of Chapter 11, Article 10 et seq, of the West Virginia Code. The first assessment was for combined sales and use tax for the period of April 1, 2011, through August 31, 2013, for tax in

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<sup>1</sup> To be clear, the Petitioner in Docket Nos. 14-396 CU and 14-395 PT is Company A., a corporation which operates a restaurant. The Petitioners in Docket No 14-397 P are the Petitioners, individually. Hereafter, references to the “Company” will be referring to Company A and Petitioners will be referred to as “the Petitioner”.

the amount of \$\_\_\_\_\_, interest in the amount of \$\_\_\_\_\_, and additions to tax in the amount of \$\_\_\_\_\_, for a total assessed tax liability of \$\_\_\_\_\_. The second assessment was for pass through entity tax for the period January 1, 2011, to December 31, 2013, for tax in the amount of \$\_\_\_\_\_, interest in the amount of \$\_\_\_\_\_ and additions to tax in the amount of \$\_\_\_\_\_, for a total assessed liability of \$\_\_\_\_\_. The third assessment was for personal income tax for the period January 1, 2011 to December 31, 2013, for tax in the amount of \$\_\_\_\_\_, interest in the amount of \$\_\_\_\_\_, and additions to tax in the amount of \$\_\_\_\_\_, for a total assessed liability of \$\_\_\_\_\_. Written notice of these assessments was served on the Company and the Petitioner, as required by law. Thereafter, on December 18, 2014, the Company and the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, three petitions for reassessment. See W. Va. Code Ann. §§ 11-10A-8(1); 11-10A-9 (West 2010). Subsequently, notice of a hearing on the petitions was sent to all parties, and an evidentiary hearing was held over four days, May 30, 2018, June 6, 2018, July 9, 2018 and August 16, 2018, at the conclusion of which the parties filed legal briefs.<sup>2</sup> The matter became ripe for a decision at the conclusion of the briefing schedule.

#### FINDINGS OF FACT

1. The Company operates a restaurant in a West Virginia City. The restaurant is primarily an all you can eat Chinese buffet; however, customers also have the ability to order off of a menu.
2. In 2013, the Company was selected by the Tax Commissioner for an audit.
3. While the date is unclear, this was the second time the Company was audited for under-reported sales/unremitted sales tax. Tr. #3 P87 at 7-14

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<sup>2</sup> The evidentiary hearings in this matter were conducted by Administrative Law Judge Crystal Flanigan, and the decision was written by Chief Administrative Law Judge A.M. "Fenway" Pollack.

4. The audit began by having Tax Department employees sit outside the restaurant over two days in June. Specifically, the observation days were Thursday, June 27, 2013 and Friday June 28, 2013.<sup>3</sup>

5. During the observations, one Tax Department employee sat and took notes regarding each customer that entered the restaurant from opening until sometime in late afternoon and then another employee took over until the restaurant's closing time. These notes included whether the customers were adults or children, men or women and in many cases what they were wearing. State's Ex 7.

6. During the two days of observation, the observers only saw approximately five customers leave the restaurant with take-out orders. Tr. #4 P66 at 16-17 & State's Exhibit 7.

7. On the observation days, one of the observers would enter the restaurant and purchase an all you can eat meal. At the conclusion of their meal they would take notes regarding the payment transaction, including the guest check number, any numbers on the papers generated by the "cash register" and any numbers on the receipt brought back to the table after payment was completed.<sup>4</sup> State's Ex. 6A

8. It was during the payment for these two meals that the first "red flag" was raised regarding the record keeping of the Company. When the cash register receipt was brought to the table, the observer would note the transaction number. Then the observer would request a receipt. During both meals, the receipt would not only have a different transaction number, but appeared to have been generated by an entirely different machine. Tr. #4 P10-12 & State's Exhibits 6A and 9.

9. The Petitioner testified that the receipts brought to the observer were generated by an "adding machine". By way of explanation, the witness testified that it was simply easier and saved many steps to print receipts from this other machine. Tr. #1 P52 at 1-6.

10. The audit continued in November of 2013, when the auditors traveled out of state to review the Company's books and records. Tr. #3 P42 at 7-8.

11. While the auditors obviously reviewed all of the Company's books and records, in keeping with past practices regarding the audits of restaurants, they were most interested in seeing the records for the two days of observations in June.

12. The records provided to the auditors while they were out of state, were from the Company's point-of-sale cash register system (hereinafter "POS"). Specifically, the auditors were

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<sup>3</sup> Over the years the Tax Commissioner has audited many restaurants by beginning with a surreptitious observation period.

<sup>4</sup> Confusingly, throughout the four days of hearings in this matter, the terms point-of-sale system, cash register, register, Z-tapes, and register receipts were used fairly interchangeably. As will be discussed below, three different types of documents were introduced by the parties. The Company's witnesses testified that one point-of-sale system generated all of the relevant documents, with one "adding machine" also generating some documents.

given (among other things) the daily summaries from the Company's POS from the two observation days (hereinafter "POS summary"). Company's Exhibits 3A, 3B, 6A and 6B<sup>5</sup>.

13. The review of the POS summary for the two days in question revealed the next red flag for the auditors. At the bottom of the POS summary for each day was a summary of the day's sales, with three entries, "dine in", "buffet to go" and "buffet." Company's Exhibits 3A, 3B, 6A and 6B. The buffet to go amount on June 27, 2013 was \$1,093.17. The auditors at first, assumed that this amount represented a catering job from that day. Tr. #3 P49 at 1-7.

14. The auditors asked the out of state accountant for additional information regarding that entry, and it was provided at a later date. What was provided later were four additional POS summaries, two for the 27<sup>th</sup> and two for the 28<sup>th</sup> of June. Petitioner's Exhibits 4A, 4B, 5A, 5B, 7A, 7B, 8A and 8B. As was explained to the auditors, these four summaries purported to show the breakdown for each observation day of both the "dine in" and "buffet to go" categories of sales. Tr. #3 P55 at 5-15.

15. When they reviewed these four additional summaries, the auditors discovered that the large dollar amount for "buffet to go" actually represented customers who had purportedly not purchased a buffet, but instead had gone to the buffet and made one purchase and paid by the pound. The auditors were also provided with a separate breakdown for those people who had ordered off of the menu.

16. The auditors considered these four later provided summaries (Company's Exhibits 4A, 4B, 5A, 5B, 7A, 7B, 8A and 8B) to be suspect because with regard to both categories, menu orders and weighed food orders, out of a total of 408 people who purportedly ordered these items, not one single customer ordered a beverage. Tr. #3 P107 at 1-6.

17. In similar fashion to the "adding machine" receipts explanation, the Company's representative testified that the reason the restaurant kept separate POS summaries for menu orders and weighed food orders (Company's Exhibits 4A, 4B, 5A, 5B, 7A, 7B, 8A and 8B) was the busyness of the restaurant. The witness testified that these menu orders, and weighed food orders would be entered into the POS when time allowed. Tr. #1 P45-46.

18. Based upon the two "red flags" observed by the auditors, the "adding machine" receipts given to the observer, and the lack of any beverage sales to the 408 customers who were not rung in as purchasing a buffet, the auditors made two determinations. First, they determined that the Company's records were not "complete" and "accurate" enough, as those terms are used in West Virginia law, to allow them to determine the Company's sales tax liability. The auditors then determined that the "best information", again as that term is used in West Virginia law, to ascertain the actual sales of the Company's restaurant, was to take the number of customers observed entering the restaurant, and multiply that by the menu price of the buffet. Specifically, the auditors took the customer counts, the lunch and dinner prices, assumed a certain percentage (60%) ordered a beverage, calculated the average take-out price, and came up with a sales figure.

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<sup>5</sup> At hearing, the Company introduced the actual POS summaries and photocopies of the same, hence the A & B designation on the exhibits.

Company's Ex. 1 and Tr. #3 P91-92 at 9-10. This sales figure was then used to calculate the amount of underreported sales and use tax, which led to that assessment.<sup>6</sup>

19. Once the underreported sales tax assessment was calculated, the auditors also issued the pass-through entity assessment against the corporation and the personal income tax assessment against the Petitioner.

## DISCUSSION

In this matter both parties agree regarding the controlling law, and neither party argues that any of the statutory or regulatory provisions are ambiguous.

The West Virginia Code provides that “[f]or the privilege of selling tangible personal property . . . and for the privilege of furnishing certain selected services . . . the vendor shall collect from the purchaser the tax as provided under this article . . . and shall pay the amount of tax to the Commissioner in accordance with the provisions of this article . . .” W. Va. Code Ann. § 11-15-3(a) (West 2010). “‘Vendor’ means any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property . . . .” W. Va. Code Ann. § 11-15-2(26) (West 2010).

Likewise, the Code provides that “The purchaser shall pay to the vendor the amount of tax levied by this article which is added to and constitutes a part of the sales price, and is collectible by the vendor who shall account to the State for all tax paid by the purchaser.” W. Va. Code Ann. § 11-15-4 (West 2010). Section 4 also lays out the record keeping requirements for vendors tasked with collecting sales tax.

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<sup>6</sup> A portion of the sales and use assessment actually involved unremitted use tax, however the Company does not dispute that portion of the assessment.

(b) The vendor shall keep records necessary to account for: (1) The vendor's gross proceeds from sales of personal property and services; (2) The vendor's gross proceeds from taxable sales; (3) The vendor's gross proceeds from exempt sales; (4) The amount of taxes collected under this article, which taxes shall be held in trust for the state of West Virginia until paid over to the tax commissioner . . . .

Id.

Section 14a of Title 110, Series 15 of the West Virginia Code of State Rules also lays out the record keeping requirements of business people in the state, “Every person doing business in the State of West Virginia . . . shall keep complete and accurate records as are necessary for the Tax Commissioner to determine the liability of each vendor or vendee for consumers sales and use tax purposes.” W. Va. Code R. § 110-15-14a.1 (1993). Each record kept by persons doing business in West Virginia “shall consist of the normal books of account ordinarily maintained by the average prudent person engaged in the activity in question . . . .” *Id.* at 14a.2. Further, “[I]f records are inadequate to accurately reflect the business operations of the taxpayer, the auditor will determine the best information available and will base the audit report on that information.” *Id.* at 14b.4.

Finally, the Office of Tax Appeals is not bound by the rules of evidence. See W. Va. Code Ann. § 11-10A-10(c) (West 2018) (The office of tax appeals may admit and give probative effect to evidence of a type commonly relied upon by a reasonably prudent person in the conduct of his or her affairs). This Tribunal has traditionally ruled that Section 10(c) directs us to use common sense when it comes to questions regarding the evidence presented in a matter. Even if the OTA was bound by the rules of evidence, Rule 201 of the West Virginia Rules of Evidence also allows for a sort of procedural/evidentiary form of common sense. “(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction”. W. Va. R. Evid.

201. Finally, the West Virginia Supreme Court of Appeals has also stated, in dicta, that courts should not abandon their common sense at the courthouse door. “Although a court may not read into a statute language purposefully omitted, courts of this state are not required to “insulate themselves from all knowledge of happenings and events in the world about them, and pretend ignorance to that which among the mass of citizens is common knowledge, . . .” State v. Blatt, 235 W. Va. 489, 500, 774 S.E.2d 570, 581 (2015) (internal citations omitted).

The law of this case boils down to a two-pronged test. First, did the Company keep the type of records of the average prudent restaurateur, such that they allowed the Tax Commissioner to accurately determine its sales and use tax liability? Next, if the Company did not keep such records, did the Tax Commissioner use the best information available to ascertain the proper sales amounts at the Company’s restaurant? This Tribunal has had many cases over the years involving facts almost identical to those before us in this matter. In most of those cases, the Petitioner would argue both prongs. First, they would typically argue that their records were in fact adequate. In virtually every case that argument would quickly fail, for two reasons. First, the observers would count 100 people entering, but the cash register tape would only show 75 rung up for the day. Secondly, the observer’s lunch or dinner receipt would not show up on the register tape at all. Many Petitioners would then pivot, and argue that the Tax Commissioner had not used the best information, by for example, inflating their sales, in a variety of ways, such as attributing a beverage sale to every single customer, or calculating the average check incorrectly.

This case is different, in that the Company has hitched its wagon exclusively to argument one, namely that their POS system, while not perfect, is good enough for the Tax Commissioner to properly ascertain their sales. Specifically, the Company argues that their system shows each day’s sales, buffets, menu orders, and weighed orders. The Company further argues that there are

logical explanations for the Tax Commissioner's concerns regarding the lack of beverage sales to certain customers and the "adding machine" receipts given to the observers at the conclusion of their meals. For the reasons stated below, we find the Company's arguments to be unpersuasive.

We address first, the auditors' concerns regarding the receipts the observer was given at the conclusion of her two meals. The Company contends that it is just simpler and more efficient to provide the type of receipts as evidence by State's Exhibit 9.

ATTORNEY FOR COMPANY: When the state came to audit you ---. And I guess let me back up a question. I know this is a little bit of an issue. On the date that there was --- the head count was taken, there seems to be some confusion, and I'll go ahead and show you what has been marked as State's Exhibit Number 9, where one of the state auditors had a different number on their receipt that they got from the counter than the number on the ticket that they receive with the order. Can you explain how that would happen, because it appears to be odd?

COMPANY A: Yes. This one, because if we get them the receipt from the computer, it will be because we need it from original screen, and exit and go to the other list and find all the payment, and find out the check number and print the receipt. So this is the easy way, sometimes the customer, they don't require the itemized receipt. They just say, can I have receipt for --- have a buffet and a soda? So this is much easier way. They save many steps. Then we print it from the computer. So that's why I can --- so this one is only for --- we just created to give the customer this receipt, we just want to save a lot of steps. We don't even know --- count them as one together within the computer receipt.

ATTORNEY FOR COMPANY: So this is ---. Are you ---? I'm sorry, I didn't mean to ---.

COMPANY A: Yeah. This is just for the easy way, customer --- we thought customer just come in, ask we want --- can I have receipt for one customer, one lunch, something? I would --- just one made for the amount and maybe they require for the business or required amount for their lunch. So this has saved a lot of steps, print from the computer, because it's on the computer, we need several steps, so ---



We should state at the outset that we find the witnesses testimony regarding these events to be less than enlightening. However, in the Company's initial post hearing brief, this chain of events was more clearly explained.

13. After the customer finished their meal, the server would provide the customer with the Terminal Receipt that provided the total for the customer's meal and the sales and use tax that Petitioner imposed on such meal. Id. 43: 22-23, 45:1-5.

14. The customer would then pay the total for the meal by either (1) giving payment to the server for the server to take to the cashier (who was either the manager or the hostess) located in the front of the building to tender the payment, or (2) proceeding to the front of the restaurant to the cashier directly to pay for the meal. Id. 43:22-23, 44:1-5, 45:1-5, 85:15-22, 86:1-2, 89:22-23, 90:1-13.

15. When the server handled the payment of the meal, the server would proceed to the cashier to tender the form of payment by handing the cashier the Terminal Receipt. The cashier would hold on to the Terminal Receipt and either run the customer's credit card or make change if the customer paid in cash. Id 90: 1-15; (Official Transcript of August 16, 2018, Evidentiary Hearing CONS 15-0019, 11:1-6, 52:10-21, hereinafter "August Hearing Tr.").

16. The server would then return to the table with any change or the credit card receipt (if the customer used a credit card) to the customer without a copy of the Terminal Receipt. Id

17. If a customer requested a receipt for their meal, the cashier or the server, depending on who was asked, would produce a receipt from an adding machine that totaled the customer's order ("Adding Machine Receipt") due to the volume of customers, time, and number of steps it would take to locate the customer's exact POS Receipt from the point of sale system ("POS Receipt") where the transaction was recorded. Id 53: 8-20; 54:1-13; 72:5-11.

See Company's Initial Brief, Page 7. As directed by the Blatt Court, we will apply common sense to the Company's version of events, and when we do, we find it less than credible. Based upon the facts laid out in the Company's brief, when a customer at the restaurant asks for their check, they are given one receipt, the "terminal receipt." However, common sense, and years of eating in restaurants, tells us that in virtually every instance, customers are brought two receipts, one that says "merchant copy" and one that says "customer copy." Clearly, the Company's POS

could do what virtually every other restaurant's POS does, because the witness testified that "they save many steps" by using the "adding machine." In other words, if the Company's POS can generate another terminal receipt (albeit with a lot of steps) when a receipt is requested, then it clearly could generate two of them when the check is first brought to the customer for payment. This begs the question as to why a restaurant that is supposedly so busy that, as will be discussed in greater detail below, they cannot ring up 40% of their customer's orders, would not just bring two terminal receipts when the customer asks for their check? It seems odd that such a busy establishment would create a situation, a special trip to this adding machine to input data, when their POS, by their own testimony, will create a customer receipt.

We believe that the confusion can be explained by the fact that the "adding machine" that the Company's witness mentioned over twenty (20) times during the evidentiary hearings was really a second cash register, and numerous times the Company's witness admitted as such.

ATTORNEY FOR COMPANY: So do you have one cash register or multiple cash registers?

COMPANY A: I have a --- we have a computer and the one drawer. And we have another one, a cash register, but that one only for calculator and adding machine because sometimes people do takeout and they have a buffet --- I mean they have a menu to go, like a buffet to go

Tr. #1 P44 at 11-14.

ATTORNEY BREECE: Okay. And I have more questions. Let me go back. During the time of the audit, and particular when our auditors came to do surveillance, which would have been June 27th and 28th of 2013, where was the second register kept that was the adding machine?

COMPANY A: You mean where it is? Right?

ATTORNEY BREECE: Yeah. Where was it at that point?

COMPANY A: Beside the computer.

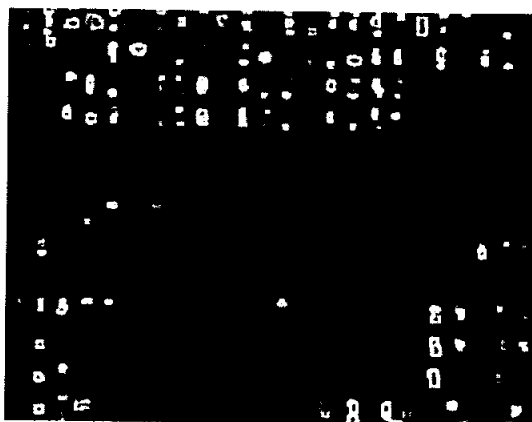
ATTORNEY BREECE: At the front counter?

COMPANY A: You mean the adding machine?

ATTORNEY BREECE: Yeah. Yeah. Adding machine, cash register. So it would look like a cash register but it's an adding machine.

COMPANY A: It's beside it.

Tr. #1 P69 at 4-15. If there was still any doubt that the “adding machine” was really a cash register, one only need review State’s Exhibit 9, a portion of which is copied below:



This Tribunal is unaware of any adding machine that has the address and telephone number of an establishment, and that also assigns a customer number and calculates sales tax. Clearly the restaurant had a cash register in addition to its POS. In an attempt to mitigate this troublesome fact, the Company’s counsel and witness, at numerous times, stressed that the restaurant only had one cash drawer, attached to their POS. However, we find that proposition equally unavailing. By definition, a cash register is a machine to calculate sales and a place to gather and store cash. To suggest that the restaurant’s cash register did not have a cash drawer is simply not credible. The fact that the Company kept two cash registers is, as the auditors found, a large red flag, casting serious doubt on its claim that it kept accurate records, as required under West Virginia law.

The next red flag calling into question the accuracy of the Company's records was the large cash entries at the bottom of the two daily POS summaries. Once the auditors were provided with Company's Exhibits 4A, 4B, 5A, 5B, 7A, 7B, 8A and 8B they came to learn that the restaurant was not entering every order into the POS at the time payment was tendered. The orders that were entered later were menu orders and weighed food. The red flag for the auditors regarding these later entered orders was the fact that POS summary for weighed orders did not reflect a single customer ordering a drink. The Company argues that not everyone in a restaurant orders a beverage. This Tribunal believes that the auditors were too quick to judge. To be clear, what we mean by that is not to suggest that we find the Company's records regarding menu and weighed items to be accurate. On the contrary, having reviewed all the testimony and exhibits carefully, we are of the opinion that the fact that supposedly none of the weighed items customers ordered a soda is the least of the accuracy problems with these records.

In similar fashion to the explanation regarding the "adding machine" receipts, the Company argues that the restaurant was simply too busy to allow it to ring up any customer who did not order a buffet. Again, we turn to the direction from the Blatt Court regarding common sense. Unless one lives in a Ted Kaczynski cabin in the woods, eating at an all-you-can-eat buffet is something most Americans do at one time or another. To suggest that they are so much busier than any other restaurant is not correct. Ironically, when it comes to the wait staff, with all due respect to them, to suggest that they are as busy as the wait staff in a typical restaurant is not accurate. The busy people in a buffet restaurant are the cooks.

Even if the Company is given the benefit of the doubt regarding how busy its restaurant is, its version of events regarding menu and weighed orders is still lacking on several fronts. The Company's own records show that during the lunch period (11:00 a.m. to 3:45 p.m.) on June 27,

2013 the restaurant served 488 people, 253 adult buffets, 19 kid buffets, and 216 weighed items. Throughout the course of the day the Company claimed that 19 people ordered off the menu, however, the record does not establish what time of day these orders were placed. If we split those between lunch and dinner that would put the total number served during lunch at approximately 498. Based upon those numbers, the Company is claiming that approximately 40% of its lunchtime crowd did not have the buffet. Further, State's Exhibit 8 reveals that the average check for this 40% is \$4.06 versus an average check of \$6.11 for those having the buffet.

Once again, we cannot ignore common sense. It certainly strains credibility to suggest that four out of every ten customers at an all-you-can-eat buffet would not avail themselves of the opportunity. This is particularly so when the very business model of buffets is, "let's see if I can get my money's worth, and eat more than you are charging me." We should reiterate that we are not talking about takeout orders, because the testimony from the observers was clear, they saw virtually no take-out orders over the course of both days. The Company's witness did not rebut this, and was clear that most of these weighed item orders were eaten in the restaurant. And there is the added problematic fact that these 40% had an average check more than \$2 lower than the buffet customers.

Finally, we find the way these weighed orders were rung into the POS to be problematic. Both the testimony at hearing and the Company's post hearing briefs state that the menu orders and weighed food orders were entered later, when the restaurant was not so busy. We find this odd, for two reasons. First, the Company's witness testified that the scale they used to weigh the food was up front at the register.

ATTORNEY BREECE: Okay. And then you mentioned people bought --- they would weigh items and buy them. Where was the scale located?

COMPANY A: We have a two-step. One is we put a computer and cash register, we have an upper one. We have put a scale on the corner area just also close, very close to the register.

ATTORNEY BREECE: So it's on the front counter. Now was it there back in 2013, ---

COMPANY A: Yes.

ATTORNEY BREECE: --- the scale? That's where it was located?

COMPANY A: Uh-huh (yes).

ATTORNEY BREECE: Okay. And how would you record the weights, on the adding machine or the cash register?

COMPANY A: Okay. And the people, and taking the food and they put on the scale, and we print out on the tape. That has the price, weight and the --- so we print out on the tape and there's the price there. So we put the --- we sticker on the paper, ---

ATTORNEY BREECE: Uh-huh (yes).

COMPANY A: --- putting the cash one and the credit card one. So because it may pay credit card, I put it in the credit card paper. If they pay the cash one, I put it in so we separate it, separate it. One cash, one credit card, so ---.

Tr. #1 P69-70 at 20-13. While we again find the witnesses testimony to be less than illuminating, we note two things. First, that the scales were right next to "the register," and secondly, that when a customer ordered weighed food the register, (whichever one we are talking about) produced a sales slip. Those facts certainly call in to question the accuracy of the Company's version that the restaurant was too busy to ring up these sales. This brings us back to the discussion above, concerning the adding machine receipts. In like fashion, it certainly strains credibility for the Company's witness to testify that 1) the restaurant was too busy to ring in these sales at the time, but then, during the same testimony, to state that when someone purchased weighed food they "print out the tape . . . put sticker on the paper . . . (and) putting the cash one and the credit card one." To this Tribunal, it certainly sounds like the witness was describing the

ringing up of a sale. The Company has certainly not done an adequate job of explaining why a restaurant employee, doing whatever the witness was trying to describe, while standing right next to the Company's POS, was simply too busy to ring that sale in, so that it would be sequentially saved in the day's sales report. This version leaves one other important question unanswered, namely, what is the Company doing with the cash and credit card slips for these weighed food sales? The Company claims they are too busy to ring these sales up at the time, but that is nonsensical. If a customer has purchased weighed food costing \$5.62, and it is time to pay, they must have something in their hand saying they owe \$5.62. And when that customer tenders their \$5.62, either with cash or a credit card, the Company must do something with that cash or credit card slip. Therefore, the suggestion that these sales are not rung up until quieter times is not credible.

We have saved the most problematic question regarding the sales of weighed food for last. Both in testimony and in post hearing briefs the Company claims that the weighed food sales were entered into the POS when the restaurant was not as busy.

COMPANY A: Because this one is --- we put the --- we not put it in the computer, I mean the computer right away. And we waited, we print out a ticket for the weighed amount. And then we put it on the --- like paper and if cash, we put a cash sign. And customer pay credit card, we put in credit card. And then when we not busy time, we going to put it all in the to go, in the computer.

Tr. #1 P45 at 18-22.

22. Due to the high volume of customers each day, the cashier did not contemporaneously enter in every single customer order into the point of sale system at the time the customer tendered payment by retrieving the customer's exact POS Receipt. Rather, the cashier would use the number provided on each Terminal Receipt to retrieve the customer's order from the point of sale system throughout the day at less busy times. When the cashier retrieved the orders, the transactions were completed, entered into the point of sale system, and recorded with a transaction number on the Z Tapes.

See Company's Initial Brief, Page 8-9.

The problem with these versions of events is that they don't match the documentary evidence. As stated above, when the auditors traveled out of state they were initially provided with Company's Exhibits 3A & 7A, the POS summaries for the 27<sup>th</sup> and 28<sup>th</sup>. Those summaries only had a total dollar amount for the menu/weighed orders. It was only when the auditors inquired further that they were later given Exhibits 4A, 4B, 5A, 5B, 7A, 7B, 8A and 8B. What this Tribunal finds puzzling is how come the menu/weighed orders that were supposedly entered during down times at the restaurant are not anywhere to be found in the POS summaries for the two days. Common sense would dictate that if the cashier entered a couple of these orders, say at 2 p.m. and then a couple more at 2:18, and then one at 3 p.m. and five more at 3:08, and eventually, by the end of the day they were all entered, as testified to, then these sales would be in the POS summary for that day. But they are not, and the Company has offered no reasonable explanation as to why not. Ultimately, this Tribunal finds the fact that menu/weighed items are not sequentially noted on the restaurants POS summary for the day to be quite suspect.

There is one more red flag that merits discussion, despite the fact that it was barely mentioned by the Tax Commissioner's witnesses at hearing. That fact is that the customer counts as tabulated by the observers over the two days are higher than what was reported by the Company in its POS summaries. On June 27, 2013, the observers counted 793 adults and children entering the restaurant. The Company's count totaled 740, a difference of 53 customers. The undercount on June 28<sup>th</sup> was much greater, with the Tax Department counting 1069 customers, and the Company reporting 860 served, a difference of 209 customers. We are surprised that the Tax Commissioner did not rely on this one fact alone to prove that the Company did not keep accurate



records, as that term is used in Section 14a.1 of Series 15, Title 110 of the West Virginia Code of State Rules.

We should point out that at hearing and in post hearing briefs the Company argued regarding the Tax Commissioner's counts. Specifically, the Company argued that the Tax Department should have calculated a margin of error in the customer counts.

ATTORNEY FOR PETITIONER: Considering these notes that were in the observer's notes in calculating the number of people that were entering the business and the difficulty they had for several reasons, would you expect to see a margin of error associated with their head count due to that difficulty?

COMPANY A: Yes.

ATTORNEY FOR PETITIONER: And what would be, in your expert opinion, a fair or reasonable margin of error that you would normally expect to see considering those types of notes and this type of observation?

COMPANY A: There's no doubt that there will be errors. But based on my previous audits, if they were to do a head count, they are --- I would say the margin of error is between five to ten percent. And with those comments, I would say that's probably, you know, geared towards more like ten percent.

Tr. #1 P149 at 8-19 (emphasis added). Counsel for the Company cross examined the observers at length regarding any difficulty they may have had in conducting the head counts. He inquired regarding things like how far away from the entrance they were, how clear their view was, was there confusion regarding who was entering and who was exiting and did a rain-storm block the view for a period of time. This Tribunal is unclear how any difficulties the observers would have had in counting the number of customers entering the restaurant would lead to a ten percent margin of error rate in the count. At least, based upon our presumption that the Company is arguing for a ten percent downward adjustment. We are of the opinion that if the observers were

parked too far away from the door to see clearly, or if a big rain-storm made it temporarily difficult to see as clearly, then the observers would have missed some of the customers entering. Thus, if there was going to be a margin of error adjustment, it would be upward, something we presume the Company does not desire.

This Tribunal cannot find that the head counts should be adjusted downward by ten percent because the Company has not attempted, let alone succeeded in advancing the key argument necessary, namely some animus on the part of the observers towards this particular Company. As stated above, the observers counted 793 customers on Thursday and 1069 on Friday. And as evidenced by State's Exhibit 7, they not only noted the time of entry, but most of the time provided specificity, such as what type/color of clothing was worn by the customer. So, to grant the Company's downward adjustment, we would have to rule that on Thursday, the observers created 79 false entries into their count, and over one hundred on Friday. We would have to so rule, despite the fact that the Company has presented no motive for the observers, individually, or as a group, to have singled out this Taxpayer, one of millions in the state, for special adverse treatment.

Based upon the discussion above, we rule that the Company's records were not accurate enough to allow the Tax Commissioner to ascertain its sales of food and drink. We make this ruling based upon three facts, the restaurant had two cash registers, with two cash drawers, they did not enter each payment into their POS summary at the time the money was tendered, and their records did not properly account for each customer served. We would note that any one of these three facts, standing alone, would be enough for us to rule that the Company's records were not adequate.

Once we rule that a Taxpayer's records are not adequate, there is still another prong to our analysis. The second question to be answered is, did the Tax Commissioner use the "best

information available” to establish the business operations of the Company? See W. Va. Code R. § 110-15-14b.4. In many of the similarly situated cases heard in the past by this Tribunal, the Petitioners argued this second prong in a variety of ways, such as claiming that the auditors attributed a drink to every customer, or that they picked days that skewed too busy, or that they just made some other mistake in calculating the average check. In this matter, the Company argues prong two that same as prong one, namely, that the “best information” regarding their sales is their sales records ie, the POS summaries. Due to the fact that we rule that the sales records were inaccurate, we cannot agree. We realize that the Company would no doubt argue that some customers ordered off of the menu or purchased weighed food. We further rule that absent credible evidence concerning the amount of these sales, the Tax Commissioner was correct in regarding these sales as de minimus.

There is one final issue in this matter, the pass-through entity assessment against the Company and the personal income tax assessment against the Petitioners. At hearing and in post hearing briefs neither the Company nor the Petitioners made any arguments regarding these assessments. Additionally, technically, the Petitioners did not even make an appearance at hearing. While it is true that Petitioner did appear and testify, her attorney stated that her testimony was on behalf of the company. “She is not an official owner of the company but is the registered officer, vice president and registered agent to appear here on behalf of the company and testify on behalf of the company.” Tr. #1 P43 at 15-17. We assume that the Petitioner’s decision in this regard was a conscious one, and a tacit admission that if the sales tax assessment is found to be proper, then the other two are proper as well. This Tribunal has traditionally treated silence as assent, and we do so here.

## CONCLUSIONS OF LAW

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. See W. Va. Code Ann. § 11-1-2 (West 2010).

2. “The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code Ann. § 11-10-11(a) (West 2010).

3. Article Fifteen of the West Virginia Tax Code imposes a general consumer’s sales and service tax, for the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services, and it is the duty of the vendor to collect the same. See W. Va. Code Ann. § 11-15-1 and § 11-15-3 (West 2010).

4. “The purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser.” W. Va. Code Ann. § 11-15-4 (West 2010).

5. “(b) The vendor shall keep records necessary to account for: (1) The vendor’s gross proceeds from sales of personal property and services; (2) The vendor’s gross proceeds from taxable sales; (3) The vendor’s gross proceeds from exempt sales; (4) The amount of taxes collected under this article, which taxes shall be held in trust for the state of West Virginia until paid over to the tax commissioner . . . .” W. Va. Code Ann. § 11-15-4 (West 2010).

6. “To prevent evasion, it is presumed that all sales and services are subject to the tax until the contrary is clearly established.” W. Va. Code Ann. § 11-15-6(b) (West 2010).

7. “Every person doing business in the State of West Virginia...shall keep complete and accurate records as are necessary for the Tax Commissioner to determine the liability of each vendor or vendee for consumer sales and use tax purposes.” W. Va. Code R. § 110-15-14a.1 (1993).

8. If, when auditing taxpayer records, said records are, “. . . inadequate to accurately reflect the business operations of the taxpayer, the tax auditor will determine the best information available and will base the audit report on that information.” W. Va. Code R. § 110-15-14b.4 (1993).

9. The Company failed to account for and remit to the Tax Commissioner all of the sales taxes collected from its customers.

10. The records which were provided to the Tax Commissioner were not complete and accurate enough to determine the Company’s liability for consumer sales and use tax purposes. Nor were they adequate to accurately reflect the Company’s business operations.

11. The Tax Commissioner was not clearly wrong or arbitrary and capricious when he determined that the best information available, as that term is used in Section 14b.4, to reflect the Petitioner’s sales of food and drink was the observers’ customer counts times an average check amount.

12. "If the Tax Commissioner believes that any tax administered under this article has been insufficiently returned by a taxpayer, either because the taxpayer has failed to properly remit the tax, or has failed to make a return, or has made a return which is incomplete, deficient or otherwise erroneous, he may proceed to investigate and determine or estimate the tax liability and make an assessment therefor." W. Va. Code Ann. § 11-10-7(a) (West 2010).

13. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. See W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code. R. §§ 121-1-63.1 and 69.2 (2003).

14. The Compnay in this matter has not met its burden of showing that the combined sales and use tax assessments against it was erroneous as discussed above.

15. The Tax Commissioner's investigation and assessment against the Company for underreported pass through entity tax was not erroneous, unlawful, void or otherwise invalid. Nor was the Tax Commissioner's assessment against the Petitioners for personal income tax erroneous, unlawful, void or otherwise invalid.

#### DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that:  
the combined sales and use tax assessment issued against The Company on November 18, 2014,  
for a total liability of \$ \_\_\_\_\_ is hereby AFFIRMED.

The pass through entity tax assessment issued against The Company on November 18,  
2014, for a total liability of \$ \_\_\_\_\_ is hereby AFFIRMED.

The personal income tax assessment issued against Petitioners on November 18, 2014, for  
a total liability of \$ \_\_\_\_\_ is hereby AFFIRMED

Interest continues to accrue on these unpaid taxes until fully paid. W. Va. Code Ann. § 11-10-17(a) 2010).

#### WEST VIRGINIA OFFICE OF TAX APPEALS

By: \_\_\_\_\_

A. M. "Fenway" Pollack  
Chief Administrative Law Judge

\_\_\_\_\_  
Date Entered